

BREXIT BRIEF

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The Brief seeks to provide up-to-date information on the progress and content of the UK-EU negotiations, and bring together relevant statements and policy positions from key players in Ireland, the UK and the EU.

The Brief is part of a wider communications programme covering the work of the IIEA's UK Project Group – including commentaries, speeches, texts and event reports – which are highlighted on the Institute's website. (www.iiea.com)

Introduction

The week of Monday, 11 October – Friday, 16 October 2021 saw significant developments in the ongoing Protocol on Ireland/Northern Ireland (the Protocol) story.

On Tuesday, 12 October 2021, Lord David Frost delivered a lengthy address in Lisbon on "Observations on the present state of the nation" which immediately set the terms of debate. Lord Frost raised the issue of the role of the European Court of Justice (ECJ) in Northern Ireland and argued for a new governance arrangement with international arbitration instead of EU law ultimately policed in the ECJ.

Two days later the European Commission launched its proposals on the future of the Protocol in the form of "bespoke arrangements to benefit Northern Ireland". Four detailed policy papers were tabled, covering the main areas in which difficulties had arisen and described by Commission Vice-President Maroš Šefčovič as a "package of enhanced opportunities" which had the united support of the EU Member States and Institutions.

Then, on Friday, 15 October Lord Frost travelled to Brussels to meet Vice-President Šefčovič for intensive discussions. Intensive negotiations are expected to follow this meeting. No UK communiqué was issued on this important occasion, however, as a consequence of the

murder of the Conservative MP, Sir David Amess, which dominated news and political commentary.

Section One: State of Play

Monday 11 October: Lord Frost in Lisbon

Lord Frost told an audience in Lisbon that the Protocol was not working and that fundamental change was necessary and indicated that the UK was prepared to trigger Article 16 of the Protocol which would override significant parts of the agreement if the necessary changes were not achieved. He highlighted the role of the ECJ which had “created a deep imbalance in the way the Protocol operates.” The EU would be making a “historic misjudgement” if it failed to make fresh concession.

Lord Frost continued:

Which brings me to my fifth and final point, and the biggest current problem - the Northern Ireland Protocol. It is the biggest source of mistrust between us and for all kinds of reasons, we need to fix it.

I recognise that is not easy. The history here matters. I do understand why the EU feels it is difficult to come back to an agreement reached only two years ago, though obviously that in itself is far from unusual in international relations. Equally, there is a widespread feeling in the UK that the EU did try to use Northern Ireland to encourage UK political forces to reverse the referendum result or at least to keep us closely aligned with the EU; and, moreover, that the Protocol represents a moment of EU overreach when the UK's negotiating hand was tied, and therefore cannot reasonably last in its current form.

We put forward proposals to fix things in July. They are less than many in Northern Ireland would like to see. They do not sweep away the Protocol. They work with the grain of it. They do not require infrastructure or checks at the international border between Northern Ireland and Ireland – no-one wants this and we have always opposed it. They keep Irish Sea trade arrangements for goods going into Ireland and we accept a responsibility to implement EU rules for those goods. They allow both UK and EU-standard goods to circulate in Northern Ireland. They protect the EU single market - not that it is in any way under threat. But, crucially, they would allow goods to circulate virtually freely between Northern Ireland and the rest of the UK - something that every other country in the world takes for granted.

That's why I am sharing with the Commission today a new legal text - the text of an amended Protocol, reflecting the proposals in our Command Paper, and supporting, not undermining, the Belfast (Good Friday) Agreement. I want to comment briefly on a couple of aspects of this text.

First, this new Protocol is forward-looking. The original Protocol was agreed at a time when we didn't know whether there would be a trade agreement between us and the EU. Many of the most unusual and disproportionate provisions were agreed precisely because we didn't know what the shape of our future trading relationship was going to be. In the face of uncertainty the original Protocol defaulted to excessive rigidity - rigidity which is now needlessly harming Northern Ireland. We now know have a

very far-reaching agreement between us, one which will regulate all aspects of our trade in the future. So it makes sense to situate the new agreement in that new trading context and bring it in line with those arrangements – they are after all the most significant signed by each party to date.

Second, our proposal looks more like a normal Treaty in the way it is governed, with international arbitration instead of a system of EU law ultimately policed in the court of one of the parties, the European Court of Justice. The Commission have been too quick to dismiss governance as a side issue. The reality is the opposite. The role of the European Court of Justice and the EU institutions in Northern Ireland create a situation where there appears to be no discretion about how provisions in the Protocol are implemented. The Commission's decision to launch infraction proceedings against us earlier this year at the very first sign of disagreement shows why these arrangements won't work in practice.

In advance of Lord Frost's address, Foreign Minister Simon Coveney noted in a tweet: "So the UK Government creates a new 'red line' barrier to progress that they know EU can't move on...are we surprised?" He further asked "if the ECJ was a red line for the UK then why did they sign up to the Protocol?"

Wednesday 13 October 2021: Vice-President Šefčovič Speech

Vice-President Šefčovič introduced the Commission's proposals on the "bespoke arrangements" designed to respond to the difficulties experienced by people in Northern

Ireland because of Brexit. He emphasised that he had listened to people in Northern Ireland and responded to their concerns. Many of them had argued that the immediate need was "resolve, with the UK government, the practical challenges with the Protocol that matter most to us once and for all". The Vice-President did not indicate any disposition to change the oversight role of the European Court of Justice as the final court of appeal on disputes under the Protocol.

Below is an excerpt of the Vice-President's speech:

Today, the European Commission has proposed a robust package of creative, practical solutions, designed to help Northern Ireland deal with the consequences of Brexit, while further benefitting from the Protocol on Ireland/Northern Ireland.

If I were to label these proposed solutions, I would dub them the "package of enhanced opportunities". This is in fact our core purpose.

The EU has an unwavering commitment to the people of Northern Ireland – and for this reason, to the implementation of the Protocol, which brings about unique advantages of dual access to both the UK and EU markets.

Ultimately, our number one priority remains to ensure that the hard-earned gains of the Good Friday (Belfast) Agreement – peace and stability – are protected, while avoiding a hard border on the island of Ireland and maintaining the integrity of the EU Single Market.

The reason why I am so confident is simple. We have listened to, engaged with, and heard Northern Irish stakeholders – from political leaders to businesses and a cross-section of civic society. Our proposed solutions are a direct, genuine response to concerns they have raised.

We have put a lot of hard work into this package, explored every possible angle of the Protocol, and at times, went beyond current EU law.

In effect, we are proposing an alternative model for the implementation of the Protocol. On the one hand, the flow of goods between Great Britain and Northern Ireland will be facilitated for goods that are to stay in Northern Ireland. On the other, robust safeguards and monitoring mechanisms should be put in place to make sure they stay in Northern Ireland.

in response to a clear and strong demand on the ground, we are proposing ways to enhance the participation of Northern Irish authorities and stakeholders in the implementation of the Protocol, while fully respecting the UK's constitutional order.

Our proposed solutions aim to improve the exchange of information by establishing structured dialogues between various stakeholders and the European Commission.

Northern Irish stakeholders would also be invited to attend some meetings of the Specialised Committees. And we also aim to create a stronger link between the Northern Ireland Assembly and the EU-UK Parliamentary Partnership Assembly.

When I visited Northern Ireland in September, I met its resilient business community and civic society. And I heard about potential investors from the United States and Canada keen to take advantage of Northern Ireland's unique position, provided there is clarity on how things will work first.

Earlier today, I presented this package of enhanced opportunities to our Member States and the European Parliament – we continue to stand united behind Northern Ireland, while at the same time, remaining determined to protect our internal market.

Now I invite the UK Government to engage with us earnestly and intensively on all our proposals. With them, I am convinced, we could be in the homestretch when it comes to the Protocol. It is my hope that in the coming weeks, we will jointly arrive at an agreed solution that Northern Ireland truly deserves.

Commission Proposals 13 October

The Commission package provides that most checks on goods from Britain moving to Northern Ireland supermarkets would be dropped and at least half of customs formalities would be removed. A change in EU law would be introduced to allow medicines to be seamlessly distributed from British sources and special arrangements for trade in meat products would be agreed. The relevant passages of the Vice-President's speech are reproduced below:

Today's package proposes further flexibilities in the area of food, plant and animal health, customs, medicines and engagement with Northern Irish

stakeholders. It proposes a different model for the implementation of the Protocol, in which the flow of goods between Great Britain and Northern Ireland - in respect of goods destined to stay in Northern Ireland - is facilitated to a significant extent. This facilitation is enabled by a series of safeguards and increased market surveillance to ensure the goods do not move into the EU's Single Market.

This package opens the way to a resolution of all outstanding implementation issues, thereby establishing predictability, stability and certainty for people and businesses in Northern Ireland.

A bespoke solution for Northern Ireland on food, plant and animal health (i.e. "Sanitary and Phytosanitary issues") - leading to approximately an 80% reduction in checks

Flexible customs formalities to facilitate the movement of goods from Great Britain to Northern Ireland - 50% reduction in paperwork

Enhanced engagement with Northern Ireland Stakeholders and Authorities

Uninterrupted security of supply of medicines from Great Britain to Northern Ireland for the long-term

The Commission and the UK government have been in constant contact over the past months. Following today's meeting of the College of Commissioners, Commission experts will travel to London to begin discussing these four non-papers in detail with the UK government. This

will be the start of a period of intense discussions with the UK government over the coming weeks. Vice-President Šefčovič will meet Lord Frost on Friday in Brussels.

The Commission will also continue to engage with stakeholders in Northern Ireland.

UK Government Response

The UK Government issued an immediate response to the Commission move, noting its publication, and indicating the following:

The next step should be intensive talks on both our sets of proposals, rapidly conducted, to determine whether there is common ground to find a solution. Significant changes which tackle the fundamental issues at the heart of the Protocol, including governance, must be made if we are to agree a durable settlement which commands support in Northern Ireland. We need to find a solution which all sides can get behind for the future, which safeguards the Belfast (Good Friday) Agreement, and which puts the UK-EU relationship on a stronger footing. We are ready to work hard with this in mind.

Dublin Responds

Foreign Minister Simon Coveney issued an immediate welcome for the Commission papers:

I want to thank Vice-President Šefčovič and his team for the many months of work that have gone into producing this package of proposals. This is a major

effort by the EU to address concerns raised around the protocol.

The European Commission has listened to the concerns of the people of Northern Ireland and has produced far-reaching proposals that comprehensively address the practical, genuine issues that matter most to them.

The EU's proposals follow months of hard work and careful listening across the political spectrum in Northern Ireland and with the business and citizens most impacted. Where challenges were identified, the EU found creative, credible and durable solutions.

The Commission's package respects the fine balance at the heart of the Protocol: protecting the Good Friday agreement, avoiding a hard border on the island of Ireland while at the same time protecting EU consumers and the integrity of the EU's single market.

We welcome David Frost's comments that he will engage seriously, fully and positively with the Commission. The package provides a pathway to resolving all the outstanding issues. Now is the time for the UK Government to engage constructively on the practical solutions being put forward by the Commission to the issues that matter most to the people of Northern Ireland.

The DUP leader Sir Jeffrey Donaldson claimed that the EU proposals "fell far short of the fundamental change needed." He expressed agreement with the concerns of the UK Government about the role of the ECJ in overseeing the Protocol. The UUP leader Doug Beattie warned that the Protocol will

produce political and social instability for the foreseeable future unless it is replaced. The reaction of both Sinn Fein and the SDLP was to welcome the potential changes proposed by Vice-President Šefčovič.

Friday, 15 October 2021: Frost - Šefčovič Meeting in Brussels

The UK and EU interlocutors – Lord Frost and Vice-President Šefčovič – met for lunch in Brussels on Friday, 15 October.

Lord Frost commented on the prospects for agreement as he arrived in Brussels for the talks telling reporters the following:

I think the EU has definitely made an effort in pushing beyond where they typically go in these areas and we're quite encouraged by that. But obviously there is still quite a big gap. And that's what we've got to work through today and in the future. The governance arrangements don't work. We need to take the court out of the system as it is now and we need to find a better way forward.

He insisted that the UK position is clear, as it always has been, as set out in the July Command paper in which the UK Government indicated it was unhappy with the ECJ's position as authority of last resort over the regulations that keep Northern Ireland within the Single Market for goods, avoiding a hard border with Ireland. The UK has said that it will require a concession on the role of the ECJ before a deal can be struck.

Maroš Šefčovič commented in advance of the Brussels lunch that he had not heard about the ECJ issue "from business leaders and stakeholders in civic society" and that it had appeared "very late in July in the Command

Paper and we had already agreement on the protocol for more than a year at that time.” He insisted that “We do not see how we can have the access to the single market without European Court of Justice oversight”.

Following the Brussels discussions, serious talks are expected to continue for some weeks –or even months- with Maroš Šefčovič having expressed the hope that the Protocol issue can be resolved by the end of the year. EU sources have emphasised the need to focus on practical matters and on finding solutions. It is clear that Vice-President Maroš Šefčovič operates with a united mandate but with recognition that some Member States are concerned that a deal will not be forthcoming and that contingency plans are required for that eventuality.

The same sources were quoted as saying that the EU proposals were “a call for the UK to be realistic in its demands, to focus on providing certainty, stability and predictability in Northern Ireland, rather than focus on these high-level constitutional issues”. “We’re hoping for the best but of course preparing for the worst. And of course, what I’m referring to is the fact that this is ultimately about Ireland’s place in the Single Market. We can’t exclude that the UK will nevertheless use Article 16” he added.

Lord Frost in House of Lords

Lord Frost spoke in a House of Lords debate on the NI Protocol on 13 October:

My Lords, the objective of the Northern Ireland protocol was to support the Belfast/Good Friday agreement. It is now undermining it. I set out our proposals to change these arrangements to this House and in a Command Paper on 21 July. We expect written proposals from the Commission today in response to

the current difficulties. I hope that we can resolve this situation by agreement but, if we are to do so, we will need to see significant change to the current arrangements. We set out our approach in the Command Paper. I do not think that there is much more to say. We have been clear that the threshold for using Article 16 has passed; Article 16 is a mechanism in the protocol whose use is legitimate if the circumstances require it. We would prefer to find a solution by consensus but Article 16 is there.

My Lords, we wait to see what the EU proposes to us later this afternoon. We will look at those proposals very positively and, I hope, constructively. If there are elements in them with which we can work, we will seek to do so. I do not agree that we have been moving the goalposts. We have been clear on our position since we put forward the Command Paper in July. Although other people may use the words “red lines”, I never do. We are beginning a negotiation. We have a track record of reaching successful outcomes in negotiations, despite the predictions that we would not. I hope that we will do so again this time.

NI High Court Ruling on DUP Boycott

On Monday, 11 October 2021 the Northern Ireland High Court ruled that the DUP boycott of meetings within the North-South Ministerial Council, as part of the party campaign against the NI Protocol, is unlawful.

Mr Justice David Scoffield said the boycott, launched by the DUP last month in protest of the Northern Ireland Protocol, “frustrates, is contrary to and is in breach of legal duties contained in the Northern Ireland Act”.

The pledge of office which ministers are required to affirm under the ministerial code and the *Northern Ireland Act 1998* includes a commitment “to participate fully in the Executive Committee, the North-South Ministerial Council and the British-Irish Council”, he noted.

The ruling follows judicial review proceedings brought by a Belfast businessman against DUP ministers Paul Givan, Gary Middleton, Michelle McIlveen, Edwin Poots and Gordon Lyons.

The solicitor who represented the complainant told *Irish Legal News*:

This is a very significant declaration from the court which underscores the rule of law and good governance in Northern Ireland. Our client awaits confirmation from the DUP ministers that they will act lawfully in accordance with their duties moving forward.

DUP First Minister Paul Givan commented that all parts of the Belfast Agreement are interdependent “they are interlinked, and the east west dimension has been trashed as a result of the protocol. It is regrettable that it is having a knock-on effect on the north south institutions”. The SDLP Minister, Nichola Mallon, described the ruling as “significant” and insisted that “it is time for ministers involved in this boycott to take a step back and commit to upholding their legal obligations”.

Further cross-border meetings have been cancelled with the DUP Leader, Jeffrey Donaldson, telling the BBC that “our position remains as it has been.” A meeting of the North-South Ministerial Council went ahead on Thursday, 14 October to discuss health issues.

EU Ambassador to the UK Presents his Credentials

On Tuesday, 19 October 2021, EU Ambassador to the UK, João Vale de Almeida, presented his credentials to the Queen at Buckingham Palace. Mr Vale de Almeida was appointed as the Union’s Head of Mission in London on Monday, 1 February 2021, however then Foreign Secretary Dominic Raab withheld full diplomatic recognition to him and the new EU Delegation. The EU and UK reached agreement on the recognition of both Ambassador Vale de Almeida and the UK Ambassador to the EU, Lindsay Croisdale-Appleby, on the margins of a G7 meeting in May 2021. Ambassador Vale de Almeida described the event as “an important milestone”, one which officially brings to an end an eight-month diplomatic dispute between the EU and UK.

Section Two: The Evolving Debate

Oireachtas Joint Committee, 6 October 2021

On 6 October, the Oireachtas Joint Committee on European Affairs held discussions with bodies involved in cross-border and cross-community affairs. Dr Anthony Soares Director of Centre for Cross Border Studies commented on the Article 16 issue:

I will pick up on some of the points the Deputy raised, beginning with the threat to trigger Article 16 and suspend the protocol. Triggering Article 16 does not in and of itself suspend the protocol. Rather, it will only suspend certain parts of the protocol. Civic society organisations understand that the politics of this can sometimes be magnified in a way that

is not helpful. We have also stressed, as I have done repeatedly, to key decision makers in this process that what is entirely unhelpful is the production of artificial deadlines. They are not helpful, particularly in the context of Northern Ireland, because such deadlines lead to artificial points of crisis, increasing tensions and increasing uncertainty around the process.

One needs to be conscious of and aware of the effects of tone and language on community, on cohesion and on our ability to undertake co-operation on a North-South and east-west basis. That cohesion is essential. Community buy-in to the idea of cross-Border co-operation is also essential.

Debate on UK Intentions

A number of political figures and commentators have written about the intentions and motivations of the Johnson administration concerning the Protocol.

In his political memoir, Theresa May's Chief of Staff, Gavin Barwell, addressed the issue:

David Frost said that, despite all the warnings, the government underestimated the effect of the protocol. The truth is that their initial plan was to prorogue parliament and leave without a deal. When that failed, they switched to seeking an election. It would be easier to win an election with 'an oven-ready Brexit deal'.so the strategy switched to accepting whatever deal was on offer with a view to wriggling out of it subsequently. The EU have worked out that this is what the government is up to, and are determined to hold the UK to what it signed up to.

The DUP MP, Ian Paisley Jnr has told the BBC that "Boris Johnson did tell me personally that, after agreeing to the protocol, he would sign up to changing that protocol and indeed tearing it up, that this was just for the semantics." He confirmed the reported claims of the former No. 10 adviser, Dominic Cummings, that it was always the intention to sign the Withdrawal Agreement in January 2020 but "ditch bits" they didn't like.

In a major Irish Times interview, Commissioner Mairead McGuinness expressed strong views on the Protocol dispute, arguing that her interpretation is that the government of Prime Minister Boris Johnson signed up for something it didn't really want. "I think it was in a rush to 'get Brexit done' and any Brexit will do, as long as it's done. What has been very difficult for us to understand at the European level is how a country like Great Britain would resile from an international agreement, and do it without any blushes", she said.

The former Whitehall Adviser, Jonathan Powell, has written in the Financial Times that the UK approach to Northern Ireland is one of "casual political vandalism". He said that Lord Frost had raised the purely ideological issue of the role of the ECJ and described it as "a body that has not caused any practical problems and is not germane to unionist complaints about the border in the Irish Sea. He objects to this approach to the Northern Ireland peace process, "something a previous generation of British politicians on both sides spent decades constructing".

Section Three: Background Material and Further Reading

Background Material

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